Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2258

IN THE

Supreme Court of the United States

October Term, 1981

SALVATORE INCORVAIA,

Respondent,

- against -

HELLENIC LINES LTD.,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF SEA-LAND SERVICE, INC. IN SUPPORT OF THE PETITION OF HELLENIC LINES LTD. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH T. STEARNS
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Amicus Curiae
Sea-Land Service, Inc.

WALKER & CORSA
SANDRA R. M. GLUCK
Of Counsel

TABLE OF CONTENTS

	PAGE
CONSENT TO FILING OF BRIEF *AMICUS CURIAE*	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	5
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

Allen v. *Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975)	11
Alyeska Pipeline Serv. v. *Wilderness Soc.*, 421 U.S. 240 (1975)	12
Bloomer v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980)	6, 7, 8, 9, 12
Dole v. *Dow Chemical Corp.*, 30 N.Y.2d 143 (1972)	12
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)	2, 9
Fontana v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952), aff'd on op. below sub nom., *Fontana* v. *Grace Line Inc.*, 205 F.2d 151 (2d Cir. 1953)	7, 12
Incorvaia v. *Hellenic Lines Ltd.*, 502 F. Supp. 280 (EDNY 1980), rev'd and remanded 668 F.2d 650 (2d Cir. 1982)	5, 10 13, 14
Jackson v. *Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967)	2
LeBlanc v. *Petco, Inc.*, 647 F.2d 617 (5th Cir. 1981)	11
Meyers v. *Cornell University*, 97 Misc. 2d 195 (3rd Dept. 1978), 410 N.Y.S.2d 986 (1978)	13
Reed v. *S/S YAKA*, 373 U.S. 410 (1963)	2
Valentino v. *Rickners Rhederei, G.m.B. H.*, 417 F. Supp. 176 (EDNY 1976), aff'd, 552 F.2d 466 (1977)	4, 7, 8, 9, 10, 11, 12

PAGE

Statutes

Longshoremen's and Harbor Workers' Compensation Act

33 U.S.C. § 901 *et seq.* 1

33 U.S.C. § 905(b) 1, 2, 6, 9, 10, 11, 12, 13, 14

33 U.S.C. § 907 ..... 1, 2

33 U.S.C. § 908 ..... 1, 2

33 U.S.C. § 933(e)(1)(A) 10

86 Stat. 1262 6

Workmen's Compensation Law

§ 29(1) (McKinney's Consol. Laws of New York) 12

Rules

Sup.Ct.R. 17(1)(a) 13

Sup.Ct.R. 17(1)(c) 13

Sup.Ct.R. 23 15

No. 81-2258

Supreme Court of the United States

SALVATORE INCORVAIA,

Respondent,

- against -

HELLENIC LINES, LTD.,

Petitioner.

CONSENT TO FILING OF BRIEF *AMICUS CURIAE* BY SEA-LAND SERVICE, INC.

The undersigned, attorneys of record for petitioner Hellenic Lines Ltd. and respondent Salvatore Incorvaia in the captioned proceeding, hereby consent to the filing of a brief *amicus curiae* by Sea-Land Service, Inc. in support of the petition of Hellenic Lines Ltd. for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
July 9, 1982

ZOCK, PETRIE, REID & CURTIN
Attorneys for Petitioner
19 Rector Street
New York, New York 10006
(212) 425-0310

IRVING B. BUSHLOW
Attorney for Respondent
26 Court Street
Brooklyn, New York 11201
(212) 522-7446

No. 81-2258

IN THE

Supreme Court of the United States

October Term, 1981

SALVATORE INCORVAIA,

Respondent,

- against -

HELLENIC LINES LTD.,

Petitioner.

BRIEF *AMICUS CURIAE* OF SEA-LAND SERVICE, INC. IN SUPPORT OF THE PETITION OF HELLENIC LINES LTD. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF AMICUS CURIAE

Amicus Curiae, Sea-Land Service, Inc., is the largest American flag owner and operator of ocean-going merchant vessels. In the port of New York its terminal operations, including stevedoring, are performed by employees of Sea-Land Service, Inc.—the same corporate entity which owns or bareboat charters the Sea-Land fleet of vessels. As an employer of waterfront labor it is liable in its stevedoring capacity to its longshoremen employees for workmen's compensation benefits under provision of the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA" or "the Act") in the event of injury aboard ship in the course of covered employment (33 U.S.C. § 901 *et seq.*, § 907, § 908). As shipowner or operator it is also potentially liable to longshoremen for damages under the Act's § 905(b) "as [if] a third party," despite the receipt of compensation and provision of the Act's § 905 that liability for benefits shall be the exclusive liability of an employer under the Act.[1]

1. This right of a longshoreman employed by a corporation which is both an employer under the Act and the "vessel" described in LHWCA

Sea-Land Service, Inc. (as was petitioner) is largely self-insured with respect to both its liability under the Act as an employer (stevedore) for LHWCA benefits and as a § 905(b) "vessel" (shipowner) for damages. By adopting the dual capacity once shared by Hellenic Lines Ltd. as the "vessel" and as an "employer," Sea-Land Service, Inc. has in the past and will in the future frequently face suit by its longshoremen/employees who, before institution of suit under § 905(b), have received and often exhausted, (as we believe is the case with *this* plaintiff/respondent), benefits available under the Act. This being so, Sea-Land Service, Inc. has an important interest in a determination by this Court of the correctness of the result achieved by the Second Circuit Court of Appeals.

By virtue of that Court's decision, petitioner, *solely* as a result of its dual capacity, is responsible for about half the fee and all litigation expenses said to be owed by the longshoreman to his attorney and as a result must pay *more than* the *higher* of the possibly concurrent, but never cumulative, liabilities of such dual status "employer/vessel"—compensation benefits under the Act's §§ 907 and 908, or that sum the trial jury found to be plaintiff's damages in suit under LHWCA § 905(b).

STATEMENT OF THE CASE

Salvatore Incorvaia, a longshoreman employed by Hellenic Lines Ltd., sustained personal injuries aboard the vessel, "GREGORIOUS-C-IV" on August 28, 1974 at 57th Street Pier, Brooklyn, New York ("complaint", 6a[2]) as a result of which "prior to trial" (27a) he received compensation benefits under the Act's §§ 907 and 908 amounting to $13,554.91. At the time of

§ 905(b) to sue his employer despite receipt of workmen's compensation is a codification, in altered form, of the former right of longshoremen employed directly by shipowners to sue their employers on account of vessel unseaworthiness established by this Court in *Reed* v. *S/S YAKA*, 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967). See, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

2. References followed by the letter "a" refer to pages in the Joint Appendix prepared for the appeal to the Second Circuit Court of Appeals.

this longshoreman's injury, the vessel was admittedly "owned, operated and controlled" by petitioner Hellenic Lines Ltd. (8a), his employer. Suit was filed in the United States District Court, Eastern District of New York, on January 14, 1977, 28½ months after the occurrence of injury.

The case was called for trial before the Honorable Edward R. Neaher and a jury of six on February 6, 1979 and continued on February 7th, 12th, 13th and 15th, 1979 (1a-2a) at which time the jury returned a verdict in respondent's favor in the total amount of $17,150[3], a sum but $3,595.09 greater than compensation benefits previously received. On the basis of the jury's verdict the district court apparently entered an "original judgment" (13a-14a) on February 15, 1979 for plaintiff in the amount of the (unstated) sum of the damage awards made by the jury, without allowance for compensation benefits previously received.

Plaintiff/respondent did not, however, either collect the amount of the judgment or attempt to enforce any part of it. Instead, by letter dated November 30, 1979, 9½ months after entry of judgment, the attorney for plaintiff wrote to the attorneys for defendant (40a (1)) insisting that he was "entitled to . . . [his] . . . fee plus expenses," not from his client, the injured longshoreman, but from petitioner, the vessel/employer. Respondent's attorney further proposed that after he had recovered his fee ". . . then the compensation lien is to be paid and if (sic) there is anything left over it will go to the plaintiff." In the same letter respondent's attorney concluded that his "fee in this matter is (sic) pursuant to the Appellate Department (sic) [Supreme Court of the State of New York, Appellate Division, Second Department] sliding scale and it amounts to $6,252.50," a sum representing 36.46% of the amount of the total jury award.

On November 30, 1979 respondent's attorney also requested that the vessel/employer pay respondent's "litigation expenses"

3. The jury returned a special verdict awarding plaintiff sums for past lost wages, past pain and suffering and medical expenses *only*. In short, the jury found that plaintiff had *not* sustained any permanent injury (13a).

of $856.86 or, in total, the sum of $7,109.36. That is, the attorney for the longshoreman/plaintiff claimed to be entitled to expenses and his full "sliding scale" percentage fee, determined pursuant to contingent fee retainer agreement between him and his client, applied, *not* to the $3,595.09 excess of the verdict over previously paid compensation benefits, but to the amount of the "original judgment."

What the retainer agreement provides in way of disposition of "recovery" is not part of the record. It is, however, believed that the agreement between respondent and his counsel allows the same distribution of "proceeds" as did the retainer discussed by the district court in *Valentino* v. *Rickners Rhederei, G.m.B.H.*, 417 F. Supp. 176 (E.D.N.Y. 1976), aff'd, 552 F.2d 466 (1977) a case in which that plaintiff/longshoreman was represented by the same attorney. In *Valentino, supra* (417 F. Supp. at p. 177) the district court observed that the retainer agreement provided for a percentage attorney's fee and expenses "without deductions for liens."[4]

In its answer to plaintiff's complaint petitioner pleaded payment of workmen's compensation as an affirmative defense to plaintiff's claim for damages "as a set-off and/or counterclaim against or credit against any recovery of plaintiff against defendant for (sic) all sum paid to plaintiff as compensation and medical expenses" (9a).

Treating petitioner's prior payments of compensation benefits as an alleged lien on the "proceeds" of suit (said to be $17,150 despite this affirmative defense); and because the $3,595.09 excess was insufficient to fully satisfy the percentage fee claim if calculated "without deduction for lien;" on February 13, 1980 respondent moved for an order "providing for the payment by the defendant to Irving B. Bushlow, as attorney for plaintiff the sum of $6,252.50 plus the disbursements in the sum of $856.86." On

---

4. As Judge Weinstein noted, that retainer agreement in pertinent part provided: ". . . such percentage shall be computed on the net sum recovered after deducting taxable costs . . . But for the following or similar items, there shall be no deduction in computing such percentages: liens . . ." *(id.)*

November 7, 1980 this motion was denied by Memorandum Order (27a-36a), *Incorvaia* v. *Hellenic Lines Ltd.*, 502 F.Supp. 280 (1980). On December 31, 1980 an "amended judgment" (37a-38a) was entered directing Hellenic Lines "to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien (sic)" (37a-38a). Respondent appealed and on January 5, 1982 the Court of Appeals reversed, holding that the attorney's lien for service and litigation expenses had "priority" over what was characterized as the "lien" of the employer/shipowner for compensation benefits previously paid. A petition for rehearing of the Court of Appeals' decision was denied on March 11, 1982.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Remanded to the district court for "entry of a judgment consistent with this opinion" (668 F.2d at 653) the decision of the Second Circuit Court of Appeals will achieve a result by virtue of which: (1) Salvatore Incorvaia gets *nothing* as a result of his "third-party" action except freedom from liability for disbursements and theoretical claim of fee by his attorney; (2) the attorney, whose efforts conferred no benefits upon anyone but himself, is rewarded with a fee based on the retainer agreement percentage applied to an essentially empty verdict and (3) petitioner, the vessel/employer in dual capacity, is required to pay more than its liability for all of plaintiff's damages assessed by the jury, or its obligations for compensation as determined by the United States Department of Labor, Office of Worker's Compensation Programs. Hellenic Lines, Ltd., instead of paying plaintiff's damages ($17,150) subject to *the defense of payment* to the extent of compensation benefits previously received on the grounds that in *no* event does any section of the Act allow the third-party action to result in a "double recovery" for a compensated employee or an employer's liability for an attorney's fee, is required to pay $13,554.91 in compensation plus the attorney's claim for fees and disbursements of $7,109.36 or a total of $20,664.27. That is, the

vessel/employer, for the privilege of being sued and for no reason other than to benefit an attorney, pays the *additional* sum of $3,514.27 as a result of a suit which subsequent events proved should never have been brought; while the district courts, at no inconsiderable expense to the public, are required to provide a forum for proceedings which by virtue of the vast increase in level of benefits provided by the 1972 Amendments to the LHWCA (86 Stat. 1262) are known or profoundly suspected "prior to trial" to likely result in no benefit to the injured employee.

The result of the Second Circuit Court of Appeals' decision is of course to create "value" in longshoremen's § 905(b) "third-party" suits by allowing assessment of a significant attorney's fee against the losing shipowner even in a case where by reason, for example, of the longshoreman's contributory negligence, or availability of argument that his injury resulted only in aggravation of a pre-existing progressive condition, a verdict less than the sum of compensation previously paid is absolutely assured.

In addition, the result establishes a clear conflict of interest between such longshoreman and his attorney, since whatever the amount of the benefits previously paid, he is entitled to share in a recovery by settlement upon agreement of the employer to "waive" a substantial part of its so-called "lien." This conflict encourages not only the filing of suits where no realistic prospect exists of a verdict in excess of benefits previously paid, but ensures that such case will proceed through trial, in order that the attorney can obtain payment of a fee based on an empty judgment *greater than* that which would be realized from application of the retainer percentage to an "excess" artificially created by a settlement designed to save the shipowner trial expenses and its attorney's fees.

In *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980) this Court decided the question of the liability of the insurer of an independent contractor stevedore for a longshoreman's attorney's fee where the sum recovered was large enough after deduction of the lien to allow the attorney to take his full retainer percentage from the excess. In holding that the stevedore's insurer was not

liable *pro rata* for lien recovery despite the fact that the attorney's efforts *had* created a "common fund" for the benefit of the longshoreman and the insurer, this Court seemingly decided three issues: (1) that it would be entirely inappropriate, given the vast increase in the level of compensation benefits available to longshoremen since the 1972 amendments, to allow a class of plaintiffs guaranteed substantial recoveries irrespective of fault to "receive a greater sum than would be possible in an ordinary suit for damages" (445 U.S. at p. 80). That is, this Court refused to increase the net recovery of LHWCA employees of benefits and damages combined to more than an ordinary litigant's recovery of damages less standard contingent fees by requiring the employer or its insurer to shoulder part of the longshoreman's attorney's fee burden; (2) that Congress in enacting and amending the LHWCA provided no right in favor of a covered employee to compel his employer to pay a fee for "lien" recovery, and (3) that the purposes of Congress in enacting the 1972 Amendments—to discourage often needless litigation and to conserve industry assets required to pay the more generous benefits now available—made judicial invention of such right particularly inappropriate (445 U.S. at p. 85).

In *Bloomer, supra* the majority opinion responded to Justice Blackmun's suggestion in dissent that the Court's decision would, in the verdict-less-than-lien circumstances presented in *Valentino, supra,* require the employee to "disgorge part of his compensation payments" (*id.* at p. 96) by noting (445 U.S. at 86 n. 13) that the respondent "does not challenge" the approach adopted in *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461, 463-464 (SDNY 1952), aff'd on op. below sub nom., *Fontana* v. *Grace Line Inc.*, 205 F.2d 151 (2d Cir. 1953) making expenses of suit, including attorney's fees, "the first charge" on the third-party recovery. Although unwilling to sanction a result by virtue of which an amply or even generously compensated longshoreman would do better as a result than an ordinary litigant, the majority

was not prepared to deny a LHWCA employee his full compensation whatever the outcome of his third-party action. Thus, this Court added:

> We do not today address the Valentino situation, and . . . nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses. (*Bloomer, supra*, 45 U.S. at 86, n. 13).

Three things are seemingly clear:

(1) Whenever the verdict is greater than or equal to the sum of the compensation lien and the attorney's fees, a longshoreman's attorney's fee is the first charge on the excess, and the "stevedore must be paid in full before the longshoreman receives anything." *Valentino, supra*, 552 F.2d at 470 n.5. As a result, a longshoreman is alone responsible for his attorney's fee and must, if necessary, pay the last cent of any excess in satisfaction of this obligation.[5]

(2) Whenever the verdict is less than the lien plus attorney's fees, guidance can no longer be had by reference to the recovery of the theoretical ordinary litigant. In this circumstance, a plaintiff such as Mr. Valentino perforce does better than a plaintiff not entitled to compensation, not because such longshoreman recovers *anything* from his third-party suit (he does not) but because he is not required to disgorge any part of his compensation benefits in order to pay his attorney a fee.[6]

---

5. As an example, a longshoreman recovering damages of $15,000 subject to a $10,000 lien gets nothing for his third-party action whenever the retainer fee percentage is 33⅓%. However, he does as well as an ordinary litigant because he, of course, keeps the compensation previously paid ($10,000) and as a result of his combined remedy receives, as would any uncompensated injury case plaintiff who had agreed to the same fee arrangement, 66⅔% of his damages. *Most importantly*, he does no better as a result of compensation, which would be truly an anomalous result given the generosity of LHWCA benefits.

6. Mr. Valentino keeps his $15,000 (the approximate amount of the lien in his case) because his right to compensation is concurrent with his right to damages. An ordinary litigant would get but two-thirds of the $5,000 *Valentino* verdict less disbursements. In the view of the Second Circuit Court of Appeals, Mr. Valentino's employer, for whose benefit

(3) Judicial interpretation of § 905(b) of the Act must, as best possible, "treat equally" longshoremen such as respondent who are employed directly by shipowners and those who are employed by independent contractors. Moreover, dual status employers such as petitioner must be treated equally with respect to their "third-party" liability as independent LHWCA employers. *Edmonds* v. *Compagnie Generale Transatlantique, supra* at p. 266.

The analysis of the Court of Appeals in the case at bar proceeded on two assumptions: (1) that *Valentino* survived *Bloomer*, and (2) that its applicability in any "deficiency" situation, even in suit involving a dual status employer/vesssel owner, was absolutely required by the "equal treatment" mandate. While this Court's *Bloomer* decision rejected the "common fund" analysis of *Valentino* in those cases where the verdict is equal to or greater than the sum of the lien and attorney's fee, the majority's reference to *Valentino* does suggest agreement with that holding in a "deficiency" situation. Thus, although the Court of Appeals obviously did not assume the continued vitality of *Valentino* without basis, it perhaps overlooked the necessary effect of this Court's decision in *Bloomer* on the conceptual basis of *Valentino*.

After *Bloomer*, it is clear that a longshoreman is not entitled to have his employer shoulder part of the third-party suit attorney's fees *merely* because that suit has generated a fund which benefits the employer. If *Valentino* is valid an additional fact must obtain under the rule of that case before a LHWCA employer must share payment of the employee's attorney's fee: the fund must be so small that the longshoreman, to pay his attorney, would have to draw on the amounts received by him in compensation benefits. This result can of course only be seen as acceptable *because* the employer has been benefited, not penalized, by the bringing of suit.

Judge Kearse's concurring opinion of the Court of Appeals recognized that application of *Valentino* to a dual status employer

---

recovery in the third-party suit was had, was required because of "common fund" considerations to pay the fee and disbursements of Mr. Valentino's attorney.

produced on its face an "inequitable result" (688 F.2d at 653) for reason of the fact that this petitioner not only received no benefits from the suit; but was, rather, in its vessel-owning capacity, required to pay respondent's damages exceeding the compensation benefits previously paid and, in addition, a part of his attorney's fee.

Valentino may, however, be based on the unsound assumption that in the event of a shortfall in the verdict *either* the longshoreman or the stevedore owes the attorney a fee corresponding to the retainer percentage applied to the face amount of the verdict — even in this the extreme case — where such verdict is empty with respect to the interests of the longshoreman *and* stevedore. Thus, it may be that the Court of Appeals felt compelled to apply *Valentino* for fear that Mr. Incorvaia, unlike Mr. Valentino, could be liable to his attorney for that portion of the fee not covered by the verdict. This concern, while not entirely unfounded in theory, is in fact easily resolved without need to resort to a most drastic result requiring a losing party (petitioner) to pay the victor's attorney's fees.

What may have been the court's concern is obviated if it is recognized that an attorney's fee is *not* immutable and that the federal courts have inherent power to fix an attorney's fee in §905(b) cases.[7] In the *Valentino* situation, where the employer *had* received benefit from the suit, there was no reason perceived

---

7. In this respect, a federal court judge should not have less power than a deputy commissioner, U.S. Department of Labor who is empowered under § 933(e)(1)(A) of the LHWCA to assess a "reasonable attorney's fee" where the third-party suit is brought in the name of the employer. The existence of this power is of course perfectly obvious from the fact, as the attorney for respondent acknowledges, that his fee is based on an agreement approved by the courts of the State of New York. Freedom of contract arguments *absolutely* do not lie with respect to contingent fee retainer agreements which are subject to the closest scrutiny by the courts. Thus, every case (many of which achieved diametrically opposing results) listed in petitioner's brief on the issue of disposition of proceeds amongst the employer, employee and his attorney involves intervention by the federal courts, and a determination of what fee was appropriate and in what order it should be paid. We would submit that it was the law that changed; not the terms of the retainer agreement. What is a "lien" and what are "similar items" as

to *sacrifice* the attorney's fee or any part of it.[8] But irrespective of the wisdom of *Valentino* when applied to a case involving an employee of an independent contractor, in a "dual status" employer § 905(b) suit, where the verdict is less than the amount of benefits paid plus attorney's fee *and* the attorney's effort confers no benefit on *either* the longshoreman plaintiff or his employer, there more surely can be no just reason for allowing the attorney to recover from *either* his client or the dual status employer whatever portion of his fee remains unsatisfied after reduction of the verdict by the amount of compensation benefits paid by the employer. The "equal treatment" mandate applies to LHWCA employers, and employees. It does not apply to attorneys.

Moreover, such result does *not* conflict with the "equal treatment" requirement since under this arrangement, Mr. Incorvaia, like Mr. Valentino, recovers nothing and "disgorges" nothing in payment of a fee which is not earned. Finally, were there any "inequality" of treatment, such as requiring only Mr. Incorvaia to pay his attorney's disbursements, such would be completely justified on basis of the *unquestionable* inequality of their employers' position in context of the third-party suit. The interest of an independent contractor LHWCA employer in the third-party suit is at least in the nature of a lien; and it is "fundamental that a lien does not exist without a right or obligation to support it." *Allen* v. *Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975). See also, *LeBlanc*

---

that term and phrase appears in the subject agreement; and when either should or should not count in calculating a contingent fee is a matter of law, not private contract.

8. Under *Valentino*, in a high lien case, plaintiff's attorney is encouraged to prefer his fee interest to the interest of his client in accepting a modest settlement (where some or all of the lien has been "waived"). The case at bar is an example of a situation with such potential. Petitioner, in order to save its trial expenses, might have been willing to offer a sum corresponding to what events proved to be the excess and a waiver of its "lien" in settlement. If such offer was accepted, Mr. Incorvaia would have received about $2,400 — twice the fee which would have been earned by his attorney. It is a curious result indeed that an attorney who tries a case and confers no benefit on his client does better, for himself, than one who settles and obtains an additional recovery for his client.

v. *Petco, Inc.*, 647 F.2d 617, 620 (5th Cir. 1981, dissenting op. Spears, J.). In short, the independent employer may, as a result of the third-party suit, recoup benefits already paid and obtain *relief* from its statutory compensation liability.

It is, however, entirely imprecise and inappropriate to characterize a dual status employer such as petitioner as a "lienor." Petitioner cannot realistically be seen as obligated to pay to itself in its stevedoring capacity that part of a judgment in a § 905(b) action owed in its shipowning capacity which represents compensation benefits previously paid. A dual status employer raises issue of its previous compensation payments in answer to the complaint not to assert a lien but in order to avoid *cumulative* liability for compensation and damages. It is the "entire scheme of the Act" which proscribes a "double recovery," a result which was achieved (and more) by implication of the stevedore's lien. *Fontana, supra*, 106 F. Supp. at 463. It is, therefore, clear that petitioner's interest can only be correctly seen as a right to assertion of that proscription in respondent's §905(b) action by affirmative defense of payment of compensation benefits.

Thus, unlike *Valentino*, the instant suit did not present an issue of determining priorities as between two competing lienors. Instead, it raised the question whether, under circumstances where no "common fund" can possibly be said to have been created, petitioner, the losing party, should nevertheless be required to pay the attorney's fee of the "successful" longshoreman. So understood, the holding of the Court of Appeals represents a clear violation of the so-called "American rule", identified by this Court in *Alyeska Pipeline Serv.* v. *Wilderness Soc.*, 421 U.S. 240 (1975), as to when a successful litigant may recover attorney's fees.[9]

9. It also conflicts with the applicable decisions of the New York courts which have interpreted the New York workmen's compensation law to which this Court in *Bloomer, supra* (at 445 U.S. 88, n. 15) referred for guidance. The LHWCA was adapted from the New York State statute when originally enacted in 1927 and the New York Act did not allow for attorney's fee apportionment. After the abandonment in New York of the common law rule proscribing contribution between joint tortfeasors (*Dole* v. *Dow Chemical Corp.*, 30 N.Y.2d 143 (1972)) followed enactment in 1975 of §29(1) of the New York Workmen's

Being "in conflict with applicable decisions of this Court" (Sup.Ct.R. 17(1)(c)), the Court of Appeals' decision should be reviewed by this Court. Moreover, the decision of the Court of Appeals has truly "departed from the accepted and usual course of judicial proceedings" (Sup.Ct.R. 17(1)(a)), in needlessly fashioning a result so at odds with the Congressional intention in enacting the 1972 Amendments: to discourage third-party actions by substituting a compensation remedy of sufficient generosity so as to make the §905(b) suit typically redundant—save, in the apparent view of the Court of Appeals, for the interests of the maritime bar whose so expensive participation formerly in the process of securing just compensation for LHWCA employees the 1972 Amendments were specifically designed to curb.

Congress achieved the result sought. This case proves the *typical* futility of the longshoreman's third-party action and all that remains is for this Court to make plain the important implication which follows that fact—where a LHWCA employee does as well as an ordinary litigant by recourse "before trial" to his right to compensation irrespective of fault, the "trial balloon" this third-party case represents, once again testing *only* the question whether the Amendments have worked well enough, should *not* proceed at risk of the employer; particularly on terms designed as best possible to preserve first the attorney from the impact of a "too low" verdict.

It is, regrettably, not too much to say that the Court of Appeals' decision, acknowledged in the concurring opinion as one which "produces an inequitable result" (668 F.2d at 652) in fact produces a potentially alarming one. To all but those initiated in the complexity of longshoremen's personal injury litigation,

---

Compensation Law (McKinney's Consol. Laws of New York) which permits a plaintiff to apply to the court for apportionment of attorneys' fees between himself and a compensation insurer. There will, however, be no apportionment where the "lienor," by being impleaded, is made a party against whom judgment is recovered. *Meyers* v. *Cornell University*, 97 Misc.2d 195 (3rd Dept. 1978), 410 N.Y.S.2d 986 (1978).

which the Court of Appeals aptly observed "generates an apparently limitless array of legal issues" (668 F.2d 650), the decision seems an inexplicable example of inappropriate preference of litigation and lawyers.

It is nonetheless a most anomalous result indeed that a LHWCA dual status employer within the jurisdiction of the Second Circuit Court of Appeals must pay for the privilege of being sued in the form of obligation to pay its employee's attorney's fees and expenses, but *only* when the result sought by Congress is achieved: where the generosity of benefits is proven to have withdrawn *all* benefit to the longshoreman from his third-party suit. Surely Hellenic Lines Ltd., formerly a full participant in a stevedoring industry which now provides workmen's compensation benefits to its employees on a near unprecedented level of generosity, should not be penalized for having enhanced the more dignified compensation remedy as a result of judicial encouragement of near-champertous §905(b) actions which are tried for the benefit of attorneys only.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be reversed and the order of the District Court reinstated. Amicus Curiae most respectfully submits that it would be appropriate for this Court to consider reinstating the District Court's order by summary disposition as is permitted by Sup.Ct.R. 23. We would suggest, as Judge Neaher perceived, that the correct solution lies not in weighing the issue of "lien" priority but in evaluating the question of what an attorney should appropriately earn for services in a case which he knows to be heavily encumbered (and happily so from his client's point of view) by the fruits of the 1972 Amendments.

Dated: New York, New York
July 9, 1982

Respectfully submitted,

JOSEPH T. STEARNS

40 Wall Street
New York, New York 10005
(212) 344-4700

Attorney for Amicus Curiae
Sea-Land Service, Inc.

WALKER & CORSA
SANDRA R. M. GLUCK
Of Counsel